

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION

United States Court
Southern District of Texas
FILED

AUG 04 2004

Michael N. Milby, Clerk

In re ENRON CORPORATION
SECURITIES LITIGATION

MDL-1446

MARK NEWBY, et al., Individually and
On Behalf of All Others Similarly Situated

Civil Action No. H-01-3624
(Consolidated, Coordinated
and Related Cases)

Plaintiffs,

- v. -

ENRON CORP., et al.,

Defendants.

**UNITED STATES' MOTION
FOR A LIMITED STAY OF SELECTED DEPOSITIONS**

INTRODUCTION

The United States of America submits this Motion for a Limited Stay of Selected Depositions seeking a temporary stay of the depositions of Stan Hanks, Ed Smida and David Campbell in this case (the "Class Action").¹ As noted below the government understands the Court's July 12, 2004 order and submits that the instant motion presents a compelling reason for a postponement of the depositions of these specific individuals. Because the government understands the need to advance discovery in this multi-district litigation, we seek to postpone the depositions of these three witnesses *only until the completion of the trial testimony in one criminal case, U.S. v. Kenneth Rice, et. al.,*

¹ The United States hereby incorporates by reference its previous motions and memoranda filed with this Court.

2315

Criminal No. 03-093, the criminal prosecution regarding Enron Broadband Services, (“EBS”) (hereinafter “the EBS case”), scheduled for trial on October 4, 2004.

The Court’s June 1, 2004 Order lays out a procedure to balance the procedural interests of the parties to this Case and those of the government and the public in a coherent criminal prosecution. The Court’s subsequent July 12 order denying the government’s previous motions makes clear that a request for a stay of depositions will only be granted when the circumstances present a compelling reason for doing so. We respectfully submit that such a compelling case is presented with the proposed depositions of these three witnesses. In light of the proximity of their trial testimony in the EBS case, we request that this Court stay these three depositions until November 1, 2004, or until the completion of their trial testimony, whichever is later. The government will not seek a further stay of these depositions once their testimony in the EBS case is completed.

Pursuant to the procedure established in the Court’s Deposition Protocol Order, the United States has been notified that Stan Hanks, Ed Smida and David Campbell are among the proposed deponents in the Class Action’s upcoming (September) deposition cycle. This motion is necessary because these three Class Action deponents will testify as witnesses for the government in the upcoming trial of the EBS case scheduled for October 4, 2004, before Judge Vanessa Gilmore. Judge Gilmore has previously denied the defendants’ motions to continue this trial date.

Taking these depositions at this time unduly risks disrupting the government’s criminal prosecution in the EBS case. It would also accord the defendants in this specific criminal case – all of whom are also defendants in the Class Action – improper access to discovery materials and witness statements which they are not entitled to receive under the law and procedures governing

criminal matters.² Indeed, we submit that this is precisely the scenario envisioned by the court in Campbell v. Eastland, which determined that where the public interest in preserving the integrity of and prioritizing the criminal prosecution can be achieved by a stay, “[j]udicial discretion and procedural flexibility should be utilized to harmonize the conflicting rules and to prevent the rules and policies applicable to one suit from doing violence to those pertaining to the other.” Campbell v. Eastland, 307 F.2d 478, 487 (5th Cir. 1962), cert. denied, 371 U.S. 955 (1980) (Administrative policy gives priority to the public interest in law enforcement.).

The government’s request in this instance, focused as it is on witnesses *only* in the EBS case, presents an opportunity for the exercise of that discretion and poses a minimal burden on the parties to the Class Action. Unlike its previous motions, the government is seeking a temporary delay only with respect to those individuals who the government has every intention of calling as witnesses in the upcoming EBS case and *only until* the completion of the testimony in that specific case. The government *will not* seek to stay these depositions after the completion of their testimony in the EBS prosecution. Indeed, were this not the case the government would not be making this motion. The government’s limited request minimizes the risk of disruption or prejudice to the Class Action litigants and allows other depositions and discovery procedures to proceed. Equally important, the United States’ motion also protects its interests in preventing defendants in the EBS case from unfairly using the more expansive rules of civil discovery that apply in the Class Action to obtain

² Orders granting stays of all litigation and discovery have already been entered in civil enforcement cases filed by the Securities and Exchange Commission (“SEC”) that parallel the Criminal Cases brought during the United States’ investigation. See SEC v. Fastow, Civ. No. H-02-3666, November 21, 2002 (Hoyt, J.) ; SEC v. Merrill Lynch & Co. et al., Civ. No. H-03-0946 (Hoyt, J.); SEC v. Kevin Howard, et al., Civ. No. H-03-0905 (Harmon, J.); SEC v. Jeffrey Skilling, et al., Civ. No. H-04-0284 (Harmon, J.). Two of those cases, SEC v. Howard and SEC v. Skilling, are pending before this Court.

information they are not entitled to receive in a criminal prosecution.³ Thus, the United States' motion should be granted.

The government's concern – laid out in its previous motions – that depositions in advance of the EBS criminal case will allow the defendants in that case to benefit from the more expansive rules of civil discovery, has been borne out. This Court need only look at the depositions of Ronald Hulme, Claudia Johnson and Roger Willard for examples that the government's previous assertions of prejudice were not hollow claims. For instance, Ronald Hulme was deposed over the course of two full days and his deposition occupies literally hundreds of pages. Yet only a few pages address any topic other than EBS. The civil parties have pointed repeatedly to the importance of taking specific depositions from which all further depositions and discovery will follow. As the lead engagement partner for McKinsey's Enron work, Ronald Hulme's deposition might have provided just such an opportunity for a jumping off point on a range of topics with further more detailed depositions to follow. In reality, Mr. Hulme's deposition went into exhaustive detail regarding McKinsey's work for EBS and that firm's findings regarding the state of the technology and the broadband business. The deposition focused almost exclusively on EBS while nearly ignoring other aspects of the civil case.

The same is true of Roger Willard, a member of the Enron engagement team for Arthur Andersen. Mr. Willard was deposed for four days the first of which focused exclusively on one

³ In addition, the United States' limited stay request also maximizes judicial economy. By the time these depositions take place, the deponents will have testified in the Criminal Cases and the parties in the Class action will have access to an extensive record of testimony and prior statements.

transaction – the Braveheart transaction – which is charged in the EBS indictment.⁴ Although the government is sympathetic to the importance of advancing discovery in this case, we submit that the circumstances of the upcoming EBS criminal trial and the timing of these specific depositions, considered in light of the balancing which Campbell counsels, dictate that these three depositions be postponed.

STATEMENT OF FACTS

The government will call Stan Hanks, Ed Smida and David Campbell as witnesses in the October 2004 EBS trial. They figure prominently in the EBS prosecution and their knowledge and testimony is confined nearly exclusively to this subject matter. Stan Hanks was employed as a vice president for research and technology at EBS and can testify solely about the circumstances surrounding this unit's failed development. He never worked for any other Enron business unit and left the company in January 2000, less than two years after joining EBS. Ed Smida joined EBS in March 2000. While at EBS he worked exclusively in commercial development and focused primarily on one product. Finally, David Campbell, an employee of the McKinsey consulting firm was a member of that firm's engagement team which focused on providing consulting services specifically to EBS.⁵ These individuals are uniquely situated in that their testimony will be exclusively focused on Enron's broadband business. The government seeks a limited stay with respect to these depositions precisely to avoid prejudicing its position in the upcoming EBS case.

⁴ Counsel for Mr. Willard raised a standing objection that the entirety of this questioning occurred in violation of this Court's June 1, 004 order prohibiting questioning on the subject of the criminal cases.

⁵ As noted above, the parties have already deposed Ronald Hulme, Mr. Campbell's superior on the McKinsey Enron engagement team in rigorous detail.

ARGUMENT

The government's request for a temporary stay of these three depositions is reasonable in light of the rapidly approaching trial date for the EBS case, the uniqueness of these witnesses to the that specific case, and the lack of prejudice to the parties.

If the depositions that are the subject of this Motion are permitted to take place it will undermine the government's position in the EBS case. As Campbell notes, where the public interest in the integrity of the criminal prosecution would be affected judicial discretion can be used to stay certain depositions. Campbell, 307 F.2d at 486. Through these depositions the criminal defendants will be able to obtain witness statements and discovery of their expected testimony, something they cannot do under the criminal discovery rules. "A litigant should not be allowed to make use of the liberal discovery procedures applicable to a civil suit as a dodge to avoid the restrictions on criminal discovery and thereby obtain documents he would not otherwise be entitled to for use in his criminal suit." Campbell, 307 F.2d at 487; Securities and Exchange Commission v. Downe, No. 92 Civ 4092 (PKL), 1993 U.S. Dist. LEXIS 753 at *46 (S.D.N.Y. Jan. 26, 1993). ("The Court recognizes that a stay of discovery is often necessary where liberal discovery rules will allow a litigant to undermine, or gain an unfair advantage in, a potential criminal prosecution which parallels the subject matter of the civil action."). Such discovery could seriously impede, impair, and prejudice the criminal prosecution and related investigation. "If the government would be prejudiced by [the witness] giving deposition testimony and producing documents, it should not be required to take its chances that no testimony will be given or production made in the absence of a stay." First Merchants Enterprise, Inc. v. Shannon, No. 88 Civ 8254 (CSH), 1989 WL 25214 at *2 (S.D.N.Y. March 16,

1989). The public interest in the effective enforcement of the criminal laws therefore warrants that the requested stay be granted.

Perhaps most importantly, any prejudice to the litigants in the Class Action is minimal. The government is only asking for these depositions to be postponed until their testimony in the EBS trial is complete. Trial in this criminal matter is only two months away. Regardless of the Court's ruling on the government's motion, these depositions would go forward no earlier than September by virtue of the Court's previous deposition protocol order. Accordingly, in light of the October 4, 2004 trial date in the EBS case, any prejudice to the civil parties resulting from a postponement of these depositions is minimal. The government is not seeking a delay of undefined duration, but rather for a period possibly as brief as one month from the planned September deposition cycle. There will be ample opportunity for the parties to take these depositions after their trial testimony is completed. In the meantime, the parties will be able to move forward with the deposition of other persons. In short, there is no prejudice to the Class Action litigants from postponing the depositions or at least none that should militate in favor of a denial of the government's motion.

To take the depositions of these specific individuals at this time – so close to their trial testimony in the criminal case – runs the very real risk that the civil discovery, appropriate as it may be in this case, will “do violence” to the interests of the criminal prosecution. Campbell, 307 F.2d at 487. Under such circumstances, and in light of the minimal prejudice to the parties, the authorities make clear that the government should not have to “take its chances” that no important aspect of its criminal case is prematurely disclosed during depositions of its trial witnesses in this parallel civil litigation. See, e.g., First Merchants Enterprise, 1989 WL 25214 at *2.


The United States respectfully requests that the Court exercise its discretion to harmonize the competing interests at issue and grant its motion to stay specific depositions pending their testimony in the EBS criminal case.

CONCLUSION

For the foregoing reasons, the United States' motion for a limited stay of selected depositions in the Class Action should be granted.

Respectfully submitted,

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ORDER

Upon consideration of the motion of the United States' for a Limited Stay of Selected Depositions and any opposition thereto,

IT IS HEREBY ORDERED that the depositions of Ed Smida, Stan Hanks and David Campbell are stayed until November 1, 2004, or until completion of their trial testimony in United States v. Kenneth Rice, et al., Cr. No. 03-93, whichever is later.

Dated: _____, 2004

Houston, Texas

Hon. Melinda Harmon
United States District Judge
Southern District of Texas

Certificate of Service

I, Lisa O. Monaco, hereby certify that on August 4, 2004, I served a copy of the United States' Motion For a Limited Stay of Selected Depositions, electronically pursuant to the Court's order governing service in this matter.

Lisa O. Monaco